

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0193 BLA

JOHNNY K. COLEMAN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COMANCHE COAL CORPORATION)	
)	
and)	
)	
KNOX CREEK COAL CORPORATION)	DATE ISSUED: 03/30/2016
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order On Remand of Christine L. Kirby,
Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Kevin T. Gillen (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,
Associate Solicitor; Michael J. Rutledge, Counsel for Administrative
Litigation and Legal Advice), Washington, D.C., for the Director, Office of
Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and
GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (10-BLA-5471) of Administrative Law Judge Christine L. Kirby awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on June 10, 2009, and is before the Board for the second time.¹

Previously, upon review of employer's appeal of the award of benefits, the Board affirmed the administrative law judge's findings of 10.74 years of coal mine employment,² that claimant established the existence of simple, clinical pneumoconiosis³ arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 20 C.F.R. §718.203(b), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Coleman v. Comanche Coal Corp.*, BRB No. 12-0633 BLA, slip op. at 3 n.5 (Aug. 19, 2013)(unpub.). Further, because claimant did not establish the existence of legal pneumoconiosis⁴ pursuant to 20 C.F.R. §718.201(a)(2), or complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the Board noted that the sole issue remaining was "whether claimant has established that

¹ The Board set forth previously the full procedural history of this case. *Coleman v. Comanche Coal Corp.*, BRB No. 12-0633 BLA (Aug. 19, 2013)(unpub.). It has already been determined that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *Id.* at 3 n.5.

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 8. Because claimant did not establish at least fifteen years of coal mine employment, he is not entitled to the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). *Coleman*, slip op. at 2 n.2.

³ Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

simple, clinical pneumoconiosis is a substantially contributing cause of his total disability” pursuant to 20 C.F.R. §718.204(c).⁵ *Id.* at 4 n.6.

On that issue, the Board found merit in employer’s argument that the administrative law judge erred in crediting Dr. Forehand’s disability causation opinion without considering whether it was based on Dr. Forehand’s erroneous belief that claimant has complicated pneumoconiosis. *Id.* at 5. Therefore, the Board vacated the administrative law judge’s finding pursuant to 20 C.F.R. §718.204(c), and remanded the case for her to “address whether, and to what extent, she finds that Dr. Forehand’s disability causation opinion is based on a discredited diagnosis of complicated pneumoconiosis,” and to determine whether the doctor’s opinion met claimant’s burden to establish that simple pneumoconiosis is a substantially contributing cause of his total disability.⁶ *Id.* at 6.

On remand, the administrative law judge found that Dr. Forehand’s disability causation opinion was not based solely on a diagnosis of complicated pneumoconiosis, and met claimant’s burden to establish that he is totally disabled due to simple, clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁷ Accordingly, the administrative law judge awarded benefits.

⁵ Under 20 C.F.R. §718.204(c), pneumoconiosis is a substantially contributing cause of the miner’s total disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

⁶ The Board also instructed the administrative law judge to weigh Dr. Forehand’s opinion against Dr. Tuteur’s opinion that claimant’s clinical pneumoconiosis is too mild to cause any impairment, to reconsider the evidence on the extent of claimant’s smoking history, and to reconsider whether to discredit Dr. Tuteur’s opinion as being based on an exaggerated smoking history. *Coleman*, slip op. at 6-7.

⁷ Additionally, the administrative law judge reconsidered the extent of claimant’s smoking history, and again discredited Dr. Tuteur’s opinion that claimant is totally disabled by an obstructive impairment due solely to smoking.

On appeal, employer argues that the administrative law judge erred in finding that Dr. Forehand's opinion established that simple, clinical pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).⁸ Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, filed a limited response brief, arguing that the administrative law judge reasonably interpreted Dr. Forehand's opinion as including an explanation that simple pneumoconiosis contributes to claimant's total disability. Employer has filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The record reflects that Dr. Forehand diagnosed claimant with "complicated coal workers' pneumoconiosis"⁹ and "cigarette smoker's lung disease." Director's Exhibit 14 at 4. Dr. Forehand listed those diagnoses in Block "D.6" of the Department of Labor examination report form. When asked to indicate "[t]he extent to which each of the

⁸ Employer also argues that the administrative law judge failed to comply with the Board's instruction to weigh Dr. Forehand's opinion against Dr. Tuteur's opinion, and erred in discrediting Dr. Tuteur's opinion. Employer's Brief at 13-15.

⁹ Dr. Forehand interpreted an August 13, 2009 x-ray as positive for both simple pneumoconiosis, and Category A large opacities of complicated pneumoconiosis. Director's Exhibit 14. In her first decision, the administrative law judge found that the August 13, 2009 x-ray was negative for complicated pneumoconiosis, based on the interpretations of more highly-qualified readers. Decision and Order at 8-9. Further, the administrative law judge determined that the record contained no other evidence of complicated pneumoconiosis. *Id.* at 9 n.5.

diagnoses listed in D.6 contributes” to claimant’s total disability, Dr. Forehand responded that:

Based on the claimant’s work history, appearance of the chest x-ray, pattern of disability and the fact that cigarette smoking does not cause conglomerate masses, coal dust exposure is a primary cause of claimant’s respiratory impairment. Cigarette smoking has contributed to abnormal vent[ilatory] study. Other causes of bilateral upper lobe masses to be ruled out. Had claimant not worked in coal mining, he would not be as disabled, and short of breath.

Id.

On remand, the administrative law judge found that Dr. Forehand’s disability causation opinion did not rest on a discredited diagnosis of complicated pneumoconiosis, “but rather on a finding of ‘clinical’ pneumoconiosis in conjunction with a number of other factors.” Decision and Order on Remand at 8. Specifically, the administrative law judge noted that Dr. Forehand read claimant’s x-ray as positive for simple pneumoconiosis, 1/1, and cited “the appearance of the chest x-ray” as a reason that coal dust exposure was a primary cause of claimant’s respiratory impairment. Additionally, the administrative law judge noted that Dr. Forehand opined that claimant was totally disabled. The administrative law judge further found that, the fact that Dr. Forehand indicated that smoking contributed to claimant’s impairment and that there could be other contributing factors, “d[id] not rule out coal dust exposure” as a factor. *Id.* at 9. Finding Dr. Forehand’s opinion to be well-reasoned, the administrative law judge concluded that it met “[c]laimant’s burden to establish that simple, clinical pneumoconiosis is a substantially contributing cause of his” total disability pursuant to 20 C.F.R. §718.204(c).

Employer argues that substantial evidence does not support the administrative law judge’s determination that Dr. Forehand’s opinion met claimant’s burden to establish that simple pneumoconiosis is a substantially contributing cause of his total disability. Upon review, we agree with employer. As written, Dr. Forehand’s medical report offers no opinion that simple, clinical pneumoconiosis contributes to claimant’s total disability. The report explicitly addresses why Dr. Forehand believed that the two diagnoses he listed in Block D.6—complicated coal workers’ pneumoconiosis and cigarette smoker’s lung disease—contribute to claimant’s total disability.¹⁰ Although, as the administrative

¹⁰ The diagnosis of simple pneumoconiosis, 1/1, does not appear in the medical report form completed by Dr. Forehand. It is listed on the ILO x-ray interpretation form attached to the report. Director’s Exhibit 14.

law judge noted, Dr. Forehand read claimant's x-ray as positive for simple pneumoconiosis, cited the x-ray's "appearance," and opined that claimant is totally disabled, those facts do not equate to affirmative evidence that simple pneumoconiosis is a substantially contributing cause of total disability. *See* 20 C.F.R. §718.204(c)(2). A physician's documented and reasoned medical report is needed to establish the cause of total disability. *Id.*

We remanded this case previously because factual determinations are the province of the administrative law judge. The administrative law judge's analysis, on remand, makes apparent to the Board that, at best, it is unclear whether Dr. Forehand would opine that simple, clinical pneumoconiosis is a substantially contributing cause of claimant's total disability, absent Dr. Forehand's discredited diagnosis of complicated pneumoconiosis. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 2-387 (7th Cir. 1994). The administrative law judge could only speculate or assume that Dr. Forehand so opined. *See U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 390-91, 21 BLR 2-639, 2-649-51 (4th Cir. 1999). Therefore, we conclude that substantial evidence does not support the administrative law judge's determination that Dr. Forehand's opinion met claimant's burden to establish that simple pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c).¹¹ *See Universal Camera*, 340 U.S. at 477. We must therefore reverse the award of benefits.

¹¹ Because we conclude that substantial evidence does not support the administrative law judge's finding that simple pneumoconiosis is a substantially contributing cause of claimant's total disability, we need not address employer's arguments that the administrative law judge failed to weigh Dr. Forehand's opinion against that of Dr. Tuteur, and erred in discrediting Dr. Tuteur's opinion.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge